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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

## No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD OF HEALTH OF THE CITY OF CHICAGO, DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of The City of Chicago,

*Petitioners,*

*vs.*

FIELDCREST DAIRIES, INC.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

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### STATEMENT.

MAY IT PLEASE THE COURT:

The District Court decided (35 Fed. Supp. 451; R. 1752) that plaintiff's Pure-Pak paper milk bottle was a "standard bottle", that if the ordinance were interpreted so as to prohibit it the ordinance would be unreasonable under the Illinois law, and that the passage during the pendency of the suit of the Illinois statute on pasteurization de-

prived the City of Chicago of the power to prohibit plaintiff's container because the sovereign state had approved it.

The Circuit Court of Appeals (122 F. 2d 132; R. 1782), held, one judge dissenting—giving assurance that the case had full consideration in the conference room—that the District Court was bound to notice the passage of the pasteurization statute *pendente lite* (in obedience to *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U .S. 538, 543), and that under the state-court decisions that statute took away from the City of Chicago the right to prohibit plaintiff's paper milk bottle. This was the only ground of the decision.

The court said:

> "Having thus concluded, we find no occasion to discuss at length or decide other controverted questions as to the validity of the ordinance."

The Circuit Court of Appeals also said that the language of the ordinance (Sec. 3094; R. 108) was to be interpreted as the aldermen meant it in 1935, and that "standard milk bottle" as then used did not permit plaintiff's container. This holding was perhaps due to our failure to cite in our brief *City of Chicago* v. *Alpert*, 368 Ill. 282, which contrary to the earlier case[1] cited by the C. C. A. held that legislative language is dynamic, not static.[2]

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[1] *People* v. *Barnett*, 319 Ill. 403.

[2] *City of Chicago* v. *Ben Alpert, Inc.*, 368 Ill. 282, at p. 286:

> "The General Assembly, in the quoted delegation of power, ['to direct the location and regulate the use and construction of * * * garages * * * within the limits of a city or village'] did not define 'garages' thereby limiting the authority delegated by making the word 'garages' a static or dormant con-

In a studied effort to inject supposed questions of far-reaching public concern into a simple case, the defendants have filed a petition of 59 pages contending that the decision of the Circuit Court of Appeals on the question of local law is wrong, or at least is so doubtful that the court should have left the decision of the question hanging in the air until somehow a state court had decided the question, and that the ordinance is not unconstitutional, etc., etc.

Our answer is that the Circuit Court of Appeals decided the question of local law correctly and that unless this Court grants certiorari to review that decision, there is no occasion to consider constitutional questions which the City pretends to see in this case. Neither is there, at this stage of the proceedings, any occasion to pay ex-

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cept rendering cities impotent to cope with the ever-changing conditions of a mobile and complex society. In short, cities and villages are not restricted, in directing the location and regulating the use and construction of garages, to such premises as may have conformed to the accepted popular definition of the word 'garage' in 1911, when it was incorporated in the statute. Conditions attending the storage and parking of automobiles in metropolitan areas today are vastly different from those prevailing a quarter of a century ago when the State empowered cities to regulate and license garages. It is common knowledge that in cities considerable areas are devoted to parking and storing motor vehicles. Casual observation will disclose that in some instances the premises are denominated parking lots and, in others, outdoor or open-air garages. We are not required to be insensible to this mode of transacting an important part of the automobile business. The express power to regulate the use and construction of garages is sufficiently comprehensive to authorize cities and villages to license open-air as well as closed public garages. A legitimate exercise of this power is immune from constitutional assault."

cessive tribute to the legislative branch, as the City does. The court below gave full effect to all of the rules which this Court has consistently adhered to. It properly decided that under Illinois law the legislative action of the state legislature was superior to that of the Chicago aldermen.

If the writ is allowed we shall of course wish to be heard on the question of Illinois law as to whether the ordinance is a reasonable one but since the Court of Appeals placed its decision on the other ground, we will stand in this answer on the ground stated in that court's opinion.

Despite defendants' protestation (Petition, pp. 37-38) that they are not asking this Court to reverse the judgment on the ground that the courts below should not have passed on the question of Illinois law (whether the Chicago ordinance was superseded by the Illinois Milk Plant Pasteurization act of 1939) defendants place great reliance on *Railroad Commisson of Texas* v. *Pullman Company*, 312 U. S. 496 (1941), which is wholly inapplicable unless the defendants contend that the Federal equity court should not have decided the question of Illinois law at all. That case held that where there is a readily available statutory method of reviewing a commission order, a three-judge Federal court ought not to enjoin operation of the order if that determination involved a doubtful question of state law.

Since the defendants, in spite of citing the *Pullman Co.* case, expressly disclaim any intention of asking for a postponement of the decision of the question of Illinois law until, perchance, it may be decided in some other case by a state court, the present argument of the defendants amounts to no more than this: that they think the decision by the Circuit Court of Appeals of the question of Illinois law was wrong. That is not the type of case

in which we understand certiorari is usually granted—not, at least, unless the decision is plainly wrong, which certainly the decision below was not. The court below was—we submit with all deference to this Court—in as good a position as is this Court to determine the question of Illinois law upon which the decision was based. The decision is of local interest only and does not present a question of such importance as justifies the awarding of the writ of certiorari. No conflict with Illinois decisions is shown, and in fact none exists.

If the court below misinterpreted the legislative will, the Illinois legislature can correct it. Twice the petitioners sound false alarms on that point. On pages 31-32, they say:

> "The effect of the opinion is that it is beyond the power of a state legislature to prescribe minimum standards to be observed throughout the state and at the same time to authorize municipalities to fix more stringent standards if they consider it necessary to do so."

And on page 35:

> "The boundary between the fields of state and local regulations may not be clearly defined. The decision of the Circuit Court of Appeals in effect takes away from the state legislature the power to fix the boundary and the court, in the exercise of its function to construe statutes, assumes the power itself."

In determining that the state legislature had, in fact and contrary to the defendants' contentions, withdrawn from the City of Chicago and taken back to the sovereign state the regulation of certain aspects of milk sanitation and control, the Circuit Court of Appeals emphatically did not disparage or cast any slightest doubt upon the power of the state legislature. The above quoted statements from petitioners' brief are not justified by any-

thing stated or decided in this case by the Circuit Court of Appeals and are wholly and entirely false.

In deciding the question presented, the Circuit Court of Appeals enforced the supreme power of the Illinois legislature over its reluctant and sometimes arrogant creature, the City of Chicago, and the false criticism now made of the court below is not actually based upon any refusal of the court to abide by the legislative will, but rather is grounded upon the proposition that the City of Chicago itself wishes to avoid the supremacy of state legislation which has thwarted the city's attempt to prevent the sale of milk in single-service containers, with all of their fitness for the prevention of disease and with their other benefits. Significantly, it is not the State of Illinois which is here complaining; it is only its creature, the City of Chicago. If the court below incorrectly read the legislative intention of the state legislature, the city is not without its remedy before that legislature. And in the meantime, no one is being harmed by the use of paper milk bottles. The City of Chicago has admitted this by permitting, since the date of the decision of this case by the District Court (October 18, 1940) the use in the city of millions of other paper containers without any regulation and without any proof of sanitation such as was made in the instant case, although these other containers are not of the type involved in this suit and are not protected by any injunction of any court, state or Federal. No harm has resulted from the use of such other containers without protection of any injunction, or from the distribution of milk in plaintiff's containers under protection of the present injunction, and the fact that the defendants have voluntarily permitted the use of these other containers is eloquent proof that the defendants well know that no public health hazard is involved in the use of paper containers.

## ARGUMENT.

### I.

### The court below was correct in deciding the question of Illinois law.

The defendants submitted in the trial court and in the Circuit Court of Appeals the question whether the Milk Pasteurization Plant Act of 1939 (Illinois R. S. 1941, Chap. 56½, Paras. 115-134) withdrew from the City of Chicago the right to prohibit the use of plaintiff's paper milk bottles which pursuant to such statute have been approved by the appropriate health official of the State of Illinois. Grasping at straws they now make for the first time the contention that the courts below should not have decided the question at all, but in some manner should have remitted the parties to the state courts for a decision of that question, citing *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496. Great reliance is placed on this decision by the defendants, but they ought not to be heard now to say that the courts below should have postponed the decision of the very question which all parties below submitted to such courts for decision. Furthermore, the *Pullman Company* case is not authority in the present proceeding, because in that case the Texas statute provided for a statutory method of appeal from the order of the Railroad Commission. The Illinois statutes have no comparable provision with respect to statutory appeals either from the action of the Board of Health of the City of Chicago (which, incidentally, recommended in October, 1939, that plaintiff's containers be permitted

to be used, R. 1698-1699) or from the action of the City Council in passing or refusing to pass an ordinance.

The provision for appeal from an order of the Railroad Commission of Texas is set forth in the marginal note.[1] It was on account of this statute that this

[1] 18 Vernon's Annotated Revised Civil Statutes of Texas (1926), pp. 357-358, (Title 112, Chap. 11, Art. 6453) provides:

"Art. 6453. (6657) Appeal

"If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the Appellate Court having jurisdiction of said cause; and said appeal shall be at once returnable to said Appellate Court at either of its terms; and said action so appealed shall have precedence in said Appellate Court of all causes of a different character therein pending; provided, that, if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice. Provided further that no preliminary injunction shall be issued without notice to the opposite party and that no temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified petition that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be endorsed with the date and hour of issuance.

Court held that a three-judge Federal Court sitting in equity ought not to have decided a doubtful question of Texas law concerning the validity of an order of the Railroad Commission, but should have required the parties to pursue the statutory method provided by Texas law. In no respect is the case comparable to the present one. In fact, we point to the language of Mr. Justice Frankfurter in the *Pullman Company* case as authority for the proposition that this Court ought not to substitute its judgment for that of the Circuit Court of Appeals on a matter of Illinois law. The Court said (p. 499):

"Had we or they no choice in the matter but to decide what is the law of the state, we should hesi-

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shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparably (irreparable) and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require."

tate long before rejecting their forecast of Texas law."

No argument is or can be made that the question of Illinois law submitted to the courts below was unnecessary to a decision of the case. The fact is that the courts below were required to notice the passage of the Illinois statute which occurred during the pendency of the suit. Plaintiff's complaint which the District Court had clear jurisdiction to entertain challenged the validity of the ordinance of the City of Chicago which was claimed by the City to prohibit the use of plaintiff's container. There was, therefore, no escape from deciding whether the state legislature had withdrawn from the City the power to enforce an ordinance outlawing what the sovereign state had legalized.

We submit that the City's contention made for the first time in this Court should not be entertained because it was not submitted to the court below and that if entertained the decision should be against the City's contention because the case relied on is in no respect analogous to the present situation.

## II.

## The court below correctly decided the question of Illinois law.

Whether or not the City of Chicago can by the provisions of an ordinance enacted in 1935, prohibit the use of a milk bottle which is approved of and permitted use throughout the state of Illinois by an act of the Legislature in July, 1939, is certainly not a Federal question. It is clearly a question of Illinois law.

No federal question was involved in the decision of the Circuit Court of Appeals when it decided:

(1) That the provisions of the 1935 ordinance of the City of Chicago which attempted to regulate the use of milk bottles was superseded by the Milk Pasteurization Plant Act of July 1, 1939, and was repugnant to the latter statute.

(2) That the construction of the ordinance contended for by the City of Chicago, if accepted, would allow the City to prohibit, by ordinance, the use of a milk bottle approved by the legislature and would permit it to enact and enforce ordinances contrary to the statutes of the state of Illinois and the public health policy of the state as enunciated and laid down by the state legislature.

(3) That the well established rule of law in Illinois expressed by an unbroken line of Supreme Court decisions is that no city or village can enforce or enact ordinances repugnant to state statutes and the public policy of the state.

The petitioners state (page 9) in their petition for a writ of certiorari, to review the decision of the Circuit Court of Appeals:

> "* * * nevertheless the majority opinion of the Circuit Court of Appeals sets forth a number of grounds for holding the ordinance unreasonable, indicating that the majority considered the ordinance unconstitutional (R. 1794)."

And further petitioners state on page 9:

> "There is here a question of the propriety of a judicial pronouncement that a city regulation is invalid under the fourteenth amendment * * *"

Under the heading "Reasons For Allowance of The Writ" (page 9) petitioners further state that the Circuit Court of Appeals has decided "an important question of local law in a way clearly in conflict with the local law."

Petitioners cannot create and present a Federal or a constitutional question to this Court for a decision when the sole ground of the decision below was clearly one of Illinois law regarding the effect of the state statute passed in 1939 on the ordinance enacted in 1935.

Petitioners really confess that no constitutional or Federal question is involved when they say (page 9):

> "It was not necessary for the Circuit Court of Appeals to decide this constitutional question since it held that the city had been deprived of the power to pass the ordinance."

We are therefore unable to find any rational basis for reference by petitioners (page 9) to the Fourteenth Amendment being involved.

Further, under "Specification of Errors" (page 16) petitioners make no reference to a constitutional or Federal question being involved in the decision of the Circuit Court of Appeals. The decision of the Circuit Court of Appeals states that:

> "The question for consideration is whether the ordinance now contravenes the public policy of the state of Illinois, and whether so or not, was the situation at the time of the institution of suit so altered as to make the prohibition contained in the ordinance unreasonable and void." (R. 1789.)

And further in its decision the court, having decided that the legislative act superseded the ordinance, said:

> "Having thus concluded we find no occasion to discuss at length or decide other controverted questions as to the validity of the ordinance." (R. 1794.)

It is thus very apparent that the court did not pass on any Federal question in its decision. It followed the well established law in Illinois and the rule in the decision of this Court in the case of *Vandenbark* v. *Owens*

*Illinois Glass Co.*, 311 U. S. 538 (1941) with regard to the force of the state statute.

It is difficult to believe that the defendants are serious in contending that the rulings of the trial court and the Circuit Court of Appeals "have clouded the powers of Illinois municipalities" (p. 37). This statement is not reconcilable with the practice of the City of Chicago in voluntarily permitting other dairies, not protected by any injunction, to sell milk in paper containers of a type not involved in the present litigation. Millions of such containers have been used since October 18, 1940, the date on which the district judge handed down his decision. A refusal on the part of the City to permit the use of these unprotected paper containers would most certainly have resulted in a speedy determination in the state courts of the precise question now raised in its petition, because Federal court jurisdiction based on diversity of citizenship would have been lacking as to numerous local milk dealers.

Under the heading entitled "Reasons For Allowance of The Writ" (p. 9) petitioner cites *Koy* v. *City of Chicago*, 263 Ill. 122, (1914) and *City of Ottawa* v. *Brown*, 372 Ill. 468 (1939), to support its contention that the Circuit Court of Appeals erred in interpreting Illinois law applicable to the problem involved. These two cases clearly have no competency or force to support this contention. In the case of *Koy* v. *City of Chicago*, 263 Ill. 122, the Court merely determined the right of the city to prescribe conditions under which milk might be pasteurized and, specifically, that a provision of an ordinance requiring a recording apparatus to be installed on milk pasteurizers to record the temperature of the milk during the operation was not unreasonable and was therefore valid.

The case of *City of Ottawa* v. *Brown*, 372 Ill. 468

(1939), now relied on by petitioner, decided simply that the enactment of an ordinance by the City of Ottawa in 1916 brought that City within an exception to an Act of the General Assembly of Illinois regulating the transportation, sale and use of gasoline "except in cities or villages where regulatory ordinances on the subject are in full force and effect." The question there decided by the court was solely one of fact, namely, was the 1916 ordinance governing the sale of gasoline in the City of Ottawa of such a character as to bring it within the statutory exception? The opinion of the court is completely devoid of language which, by any stretch of the imagination, could be construed to bear on the issues of the case at bar or to be in conflict with the decision of the Circuit Court of Appeals in the instant cause.

On the other hand, the case of *City of Rockford* v. *Hey*, 366 Ill. 526 (1937), is a clear-cut expression by the Supreme Court of Illinois which clearly evidences that court's attitude in a case which is substantially the same in principle as the case at bar. It was held in that case that the City of Rockford had no power by ordinance to require the owners of ice-cream factories in the cities of Sterling and Dixon (who were licensed by the Department of Health of the State of Illinois) to have their factories inspected by Rockford inspectors as a condition precedent to the sale in Rockford of ice cream products manufactured in Sterling and Dixon.

In the instant case the City undertakes to go much further; it seeks not merely to inspect, license or regulate single-service containers (the use of which the sovereign state permits) but it would if allowed to do so absolutely prohibit the use of such containers. It is at once apparent that this prohibition is precluded by the *Hey* case. If the city's present contention were sus-

tained the ordinance would effectually operate outside of the limits of the City of Chicago by interfering with and rendering practically worthless a state license issued to milk distributors who have complied with statutory regulations which permit such distributors to do what the City of Chicago takes upon itself to tell them they may not do. Obviously the City of Chicago cannot thus do indirectly what the City of Rockford could not do directly.

Petitioner contends (p. 12) that one of the reasons for the application for certiorari is that "the dictum of the Circuit Court of Appeals that the ordinance is an unreasonable exercise of the police power conflict with a long line of decisions of this court." We respectfully reply that there is no such dictum in the opinion of the Circuit Court of Appeals. The object of the ordinance being protection of public health, this object was fully satisfied by the legislature enacting the Milk Plant Pasteurization Act on July 24, 1939, (Ill. Rev. Statutes, 1941, Chapter 56½, pars. 115-134), and thereby expressing the public health policy of the State of Illinois as it applied to containers for milk. The City, the creature of the state, is certainly not possessed of power to nullify this action of the parent body from whom all the City's powers are derived.

We turn to the Illinois statutes and decisions which furnish abundant support for the opinion below and clearly refute petitioners' argument.

First, the City of Chicago has no inherent power. It is a creature of the General Assembly. To prohibit the use of any article, it must be able to point to a state statute giving it the power to do so. Furthermore, it is a cardinal rule of law that grants of powers to municipalities are strictly construed. This is well established by a long line

of well-reasoned cases and has been the subject of frequent public criticism by the distinguished corporation counsel of Chicago, Mr. Barnet Hodes,[1] but continues to be the law of Illinois, (*Bullman* v. *City of Chicago*, 367 Ill. 217 [1937]).

The rule was well stated in *City of Chicago* v. *Murphy*, 313 Ill. 98, (1924) as follows (p. 101):

> "Cities may exercise only such powers as are expressly delegated to them by the legislature. The legislature is vested with all powers not taken from it by the State or Federal Constitution. Many of its powers may be delegated by it to the cities created by

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[1] "Over and over, the Illinois Supreme Court has clung to the traditional view of all jurisdictions, and has declared: A city 'may exercise only such powers as are expressly delegated to it by the legislature and such as are necessarily implied from those expressly given'. And also: A city 'possesses no inherent power.' Time and again, cities have attempted, first by one device and then by another, to break through the barrier set up by these interpretations. But there has been little success in this direction."

"In applying the rule of strict construction whenever cities claim the right to exercise certain powers, the courts are following a well settled principle which, as much as anything else, hamstrings municipalities. This rule, as reiterated in *Arms* v. *City of Chicago*, [314 Ill. 316], a 1924 case, is:

> 'Statutes which grant powers to municipal corporations are strictly construed, and any fair or reasonable doubt of the existence of such powers is resolved against the municipality which claims the right to exercise them.'

From *Law and the Modern City*, (1937) Barnet Hodes, pp. 36, 38. (The author's preface states: "The author, of course, accepts full responsibility for the views expressed. They in no way express any official position of the law department of the City of Chicago.")

its act. Cities are creatures of the legislature and derive their existence therefrom. They have no inherent powers. All powers of cities are derived from acts of the legislature. The fact that the legislature has the power to enact a law does not confer that power upon city councils but the same must be by legislative act conferred."

If the City of Chicago ever had the power to prohibit the use of single service containers by the ordinance in question that power now no longer exists, because of the fact that its exercise would be repugnant to subsequently enacted legislation of the sovereign state.

Section 3094 of the Milk Ordinance of the City of Chicago, here involved, provides:

"Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles; provided, however, that nothing herein contained shall be construed to prohibit hotels, soda fountains, restaurants, and similar establishments from dispensing milk or milk products from sanitary dispensers approved by the board of health" (Rec. 108).

Contrast this provision with the state statute enacted during the pendency of this suit (Act of July 24, 1939, Ill. R. S. 1941, ch. 56½, Foods, pars. 115-134). Section 2 of this Act requires that any person operating a pasteurization plant who distributes or sells pasteurized milk for consumption *anywhere in the State of Illinois* shall make application to the State Department of Public Health for a certificate of approval.

Section 4 requires the Department to make an inspection of the plant and if the plant, equipment *and methods of operation* are found to comply with the provisions of the Act, to issue a certificate of approval.

Section 6 is as follows:

"Inspection and samples.] Any person, operating

a pasteurization plant or having made application for a Certificate of Approval for the operation of a pasteurization plant shall at any time allow the Department to inspect such plant and to take such samples as may be deemed necessary by said Department."

Section 8 provides:

"Products to be sold in original containers.] All pasteurized milk and milk products shall be placed in their final delivery containers in the plant in which they are pasteurized. It shall be unlawful for hotels, soda fountains, restaurants, grocery stores, milk depots, milk stations and similar establishments to sell or serve any pasteurized milk or milk product except in the original container in which it was placed at the point of pasteurization, provided that this requirement shall not apply to milk or milk products consumed on the premises which may be served from the original container or from a dispenser approved by the Department for such service. The sale or distribution of bulk, loose or dipped pasteurized milk or milk which has been heated within the purview of this Act is hereby prohibited."

Section 9 states:

"Sellers and distributors within act.] Any person selling, delivering or distributing milk or milk products in the State of Illinois who shall heat milk or milk products or subject milk or milk products to other treatment in an effort to make the milk or milk products safe for human consumption or to preserve its keeping qualities shall comply with the provisions of this Act."

The first paragraph of Section 15 is as follows:

"Any pasteurization plant coming under the provisions of this Act shall conform with all of the following items of construction, equipment, maintenance and operation *and in accordance with minimum requirements adopted by the Director* for interpretation and enforcement of this Act." (Italics ours.)

Following and as an integral part of this section are certain items, including the following:

"Item 10. All multi-use containers and equipment with which milk or milk products come in contact shall be constructed in such manner as to be easily cleaned and shall be kept in good repair. *Single service containers,* caps, gaskets and similar articles *shall be* manufactured and transported in a sanitary manner." (Italics ours.)

"Item 18. Bottling or packaging of milk and milk products shall be done at the place of pasteurization by approved mechanical equipment."

Pursuant to the power therein granted, the Director of the Illinois Department of Public Health has promulgated "minimum requirements" for interpretation and enforcement of this Act, providing, in part, as follows:

"Satisfactory compliance.—This item shall be deemed to have been satisfied if: * * *

(5) All *single-service containers,* caps, gaskets and similar articles are manufactured and handled in accordance with requirements of the Department.

(a) The buildings and rooms in which *single-service containers* and container caps and covers are manufactured, packed, stored, and handled shall be clean, well lighted and ventilated, and free from dust and flies, as prescribed in items 1, 2, 3, 4, 6, 7, 8 and 11.

(b) The average bacterial plate count of the stock from which *single-service containers* and container caps and covers are made shall not exceed 100 colonies per gram. No substance shall be present in finished single-service containers and container caps and covers which is toxic.

(c) All operations of the fabrication plant and during transportation of the manufactured articles shall be so conducted as to reduce to a minimum the possibility of contaminating the manufactured articles, as prescribed in items 13, 14 and 15.

* * * * * * *

(e) All *single-service containers* and container caps and covers shall be so treated as *to be as imper-*

*vious to milk and milk products as practicable.*" (Italics ours.)

Section 16 of the state statute is in part as follows:

> "Denial or revocation of certificate—grounds—hearing.] The Department may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any certificate of Approval because of the violation of any of the provisions of this Act or for any of the following causes:
>
> (a) Insanitary conditions of plant surroundings within the control of the plant management, insanitary methods of handling milk, milk products or *milk containers or equipment.*
>
> (b) Employment of careless, indifferent and inefficient personnel.
>
> (c) Violation of any of the provisions of this Act or of the minimum requirements for interpretation and enforcement of the Act.
>
> (d) Failure to display Certificate of Approval to the public at all times when such Certificate of Approval has been issued as provided in this Act.
>
> (e) Displaying to the public any Certificate of Approval which has been suspended or revoked or which has expired. * * *" (Italics ours.)

We shall refer below to the effect to be given to Section 19 of the Act, relied upon by the City as preserving its right to prohibit paper bottles which the state permits.

Another statute should be noticed, the statute (Ill. Rev. Stats., 1941, c. 111½, "Public Health", par. 22) establishing the State Board of Health, whose duties are now transferred to the Illinois Department of Health by Ill. R. S., 1941, c. 127, "State Government," par. 55. The Public Health Statute provides in part:

> "Sec. 2. The State Board of Health shall have the general supervision of the interests of the health and lives of the people of the state. * * *

> The Board shall have authority to make such rules and regulations * * * as they may from time to time deem necessary for the preservation and improvement of the public health, * * *.
>
> It shall be the duty of all local boards of health, health authorities and officers, * * * of the State or any * * * city * * * thereof to enforce the rules and regulations that may be adopted by the State Board of Health * * *".

It will be noticed that under the terms of the above Acts the State of Illinois, as it has the undoubted right to do, has taken unto itself the approval of not only the plant but also the equipment and methods of operation of every person (including the respondent) who pasteurizes milk for sale in the State of Illinois. It has also occupied the following fields of milk sanitation: It requires that the "bottling or packaging" of milk shall be done at the place of pasteurization; it requires that all pasteurized milk shall be placed in final delivery containers in the plant in which it is pasteurized; and it makes it unlawful for any person in the state to sell or serve any pasteurized milk except in the original container in which it was placed at the point of pasteurization.

It was recognized expressly, both by the statute and by the lawful requirements made pursuant to it, that single service containers as now known, when kept as provided in the requirements and when "so treated as to be as impervious to milk and milk products as practicable" *are entirely proper containers for the sale of pasteurized milk throughout the State of Illinois. There is not one phrase or word in the statute mentioning the words "standard milk bottles", but rather the entire statute is broad and uses the words "multi-use containers", "single-service containers", "container caps", "fabricating plant", and "covers";* and Section (A) of the provision, under "Minimum Requirements" expressly refers to buildings and

rooms in which single-service containers and container caps and covers are manufactured, packed, stored and handled, and requires that they shall be clean, well-lighted, ventilated, and free from dust and flies.

The decisions of the Illinois courts and in fact those throughout the land are uniform that a municipal ordinance which conflicts with any statute or public policy adopted by the state legislature is invalid. And in Illinois it is clear that the General Assembly may resume at any time the power previously delegated to a municipality, and this may be done by implication.

In *City of Chicago* v. *Jensen*, 331 Ill. 129 (1928), the defendant was convicted of operating a beauty parlor without a license, in violation of an ordinance of the City of Chicago. Prior to this conviction a state statute went into effect, providing for the regulation of beauty culture. On appeal, the judgment of conviction was reversed, the court pointing out that the ordinance was inconsistent with the after-enacted statute. In discussing prior decisions of the Supreme Court, and the rule of law to be drawn therefrom, the court said, at page 131:

> "This court held that while the legislature may delegate power to a municipality to grant a license for a particular occupation and exact a license fee therefor, it may at any time take away such power and the State may resume the exercise of the power; that the legislature may repeal or amend any of the provisions of the act for the incorporation of cities and villages at pleasure, and if the provisions of the statute are inconsistent with the powers conferred on the city, the statute will operate as a repeal or amendment of the powers so conferred upon the city; that a city, as a subordinate political authority, cannot interfere with the validity or force of a license issued by the State under a statute; that the statute controls the whole subject matter.
>
> "The statute repealed any power the city may have had to regulate and license beauty culture, the judg-

ment convicting appellant was erroneous, and it will be reversed."

In the case of *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402 (1925), holding that the Public Utilities act of Illinois repealed by implication the power granted to cities and villages to regulate such matters as headlights on street cars, it was argued that since the ordinance requiring street cars to be equipped with brightly lighted headlights was passed prior to the enactment of the first Public Utilities act, the ordinance would not be abrogated until the Utilities Commission had taken some action inconsistent therewith. The court said (p. 412):

> "When the first Public Utilities act came into force, on January 1, 1914, the power of the city over the subject matter of that act ceased to exist, and it could not thereafter pass new ordinances or enforce existing ordinances with reference to matters within the exclusive jurisdiction of the Public Utilities Commission. The power to enforce proceeds from the present or existing power or authority to enact or to provide. A municipality cannot be said to possess the power to enforce an ordinance concerning a subject upon which it has lost the power to pass the ordinance. Any attempt to enforce in such a situation would be defeated by interposing the act withdrawing the municipality's power to enact".

And in the early case of *Wilkie* v. *City of Chicago*, 188 Ill. 444 (1900) a Chicago ordinance required persons desiring to work as plumbers to obtain a license and pay an annual license fee of $30.00. Shortly thereafter the legislature of Illinois passed an act providing that persons desiring to engage in the business of plumbing should be examined as to their qualifications by a board created for that purpose and that successful applicants should receive certificates. In a suit to restrain the enforcement of the ordinance on the two-fold ground that (1) the city was

without power to license the business of plumbing, and (2) even if it had such power, the ordinance was in conflict with the later statute, and hence invalid, the Supreme Court affirmed a decree restraining the enforcement of the ordinance.

After pointing out that the power of the city to license the occupation of plumbing was, at least, very doubtful, the court said, at pages 452-3:

> "While the legislature may delegate the power to municipalities to grant a license for a particular occupation and to exact a license fee, they may, at any time, take away such power or resume the exercise of it themselves. The legislature may repeal or amend any provision of the act for the incoproration of cities and villages at their pleasure, and if the provisions of the act of 1897 are inconsistent with the power claimed by the city, they will operate as a repeal or amendment of the charter to that extent. * * * By this law the legislature have prescribed the test which shall enable a person to engage in the business of plumbing, and the city, by its proviso, has prescribed another and additional test. The legislature, by the law, say he is authorized to work at his trade throughout the State if he has the required certificate. The city of Chicago, by the proviso to the ordinance passed in pursuance of that law, says that he shall not work at his trade in that city except by paying $30 additional and receiving another license. The city, as a subordinate political authority, cannot interfere with the validity or force of the license issued by its board under the law. That these provisions are inconsistent is plain."

All the texts on the subject of municipal legislation announce the same rule. In 2 McQuillin on Municipal Corporations, 572 (2d ed.—1928), cited in opinion of the Circuit Court of Appeals, (Rec. 1791), the learned author states the principle that ordinances must harmonize with the public policy and common law of the State, in the following language:

> "*A Municipal corporation cannot, without special*

> *authority, prohibit what the policy of a general statute permits.* Nor, on the other hand, can an ordinance permit that which the State's policy forbids. Consequently under a general grant of power, a municipal corporation cannot adopt ordinances 'which infringe the spirit, or are repugnant to the policy, of the state as declared in its legislation.' It thus follows that if the state has expressed through legislation a public policy with reference to a subject, a municipality cannot ordain in respect to that subject to an effect contrary to, or in qualification of the public policy so established. * * *" (Italics ours.)

And in 43 Corpus Juris, 215-217, "Municipal Corporations," the rule regarding the invalidity of an ordinance which is inconsistent with the policy of the State as expressed by statute is thus stated:

> "Since a municipal corporation is a creature of the state, continuing its existence under the sovereign will and pleasure of the state, possessing such powers and such only as the state confers upon it, subject to addition or diminution of power at the state's supreme discretion, municipal regulations *must not directly or indirectly contravene the general law, nor can such regulations be repugnant to the policy of the state as declared in general legislation.*" (Italics ours.)

The Illinois cases are uniformly to the same effect.

In *City of Chicago* v. *Union Ice Cream Mfg. Co.*, 252 Ill. 311 (1911) the Supreme Court passed upon the validity of Section 1160 of the Municipal Code of Chicago which then provided for a penalty of not less than $5.00 nor more than $100.00 fine for any person who sold or offered for sale any impure or adulterated food. A statute, the Pure Food Act of July 1, 1907, enacted two years after Section 1160 of the Municipal Code was passed, provided for a greater penalty. In sustaining the ordinance as valid the court at page 313 said:

> "The laws of the state operate within the limits of

municipal corporations the same as elsewhere, unless otherwise clearly provided by municipal charters or statute. *Local laws and regulations are at all times subject to the paramount authority of the legislature.*" (Italics ours.)

In the last paragraph of this decision the Supreme Court used the following language which is indeed applicable to the ordinance here, saying at page 315:

> "Municipal authorities cannot, under a general grant of power, such as article 5 of the City and Village Act, adopt ordinances which infringe the spirit of a State law or are repugnant to the policy of the State as declared by general legislation, but the police regulations of a municipality may differ from those of the State upon the same subject, if they are not inconsistent therewith. (*McPherson* v. *Village of Chebanse*, 114 Ill. 46.) *This ordinance does not prohibit what the statute permits.* While the ordinance attaches a less penalty for its violation than does the statute, we find no repugnancy between them. The general policy under both is the same." (Italics ours.)

The pertinent language in this decision is "this ordinance does not prohibit what the statute permits." Obviously this is the test to be applied when an ordinance and state statute are to be construed.

Again, in the case of *City of Marengo* v. *Rowland*, 263 Ill. 531 (1914) the court held an ordinance of the City of Marengo requiring the closing of barber shops on Sunday invalid and again stated on page 534:

> "Municipal authorities under general grant of power cannot adopt ordinances *which infringe the spirit of a State law, or are repugnant to the general policy of the State* (*City of Chicago* v. *Ice Cream Co.*, 252 Ill. 311; 25 Amer. & Eng. Ann. cases, 675, note; *City of Clinton* v. *Wilson, supra.*) The public policy of the State is found in its constitution and statutes, and, when they are silent, in its judicial decisions and the constant practice of its public officials." (Italics ours.)

We submit, that if, as the court said in these decisions, a city cannot *adopt* such an ordinance, then *it certainly cannot by any process of reasoning enforce one that prohibits a right given by statute.* Since the legislature has clearly expressed the public policy of the state on health and the use of single-service milk containers such public policy is not to be shackled by ordinances or regulations of a city repugnant to it.

To prohibit the use of single-service containers would result in nullifying a provision of the statute, which is the paramount regulation. Legislatures are not subservient to municipalities in their expression of public policy but the municipality is subservient to the legislature.

This rule has been applied in a number of Illinois cases, some of which are cited in the opinion of the Circuit Court of Appeals. *Village of Atwood* v. *Cincinnati, etc. R. Co.*, 316 Ill. 425 (1925); *City of Marengo* v. *Rowland*, 263 Ill. 531, 534 (1914); *City of Chicago* v. *Union Ice Cream Mfg. Co.*, 252 Ill. 311, 315 (1911); *City of Chicago* v. *Drogasawacz*, 256 Ill. 34, 37 (1912).

In *Kizer* v. *City of Mattoon*, 332 Ill. 545, (1928) the validity of an ordinance regulating the storage of inflammable liquids, enacted after July 1, 1919, was involved. On July 1, 1919, an Illinois statute became effective:

> "Except in cities and villages where regulatory ordinances upon the subject are in full force and effect the Department of Trade and Commerce shall have power to make and adopt reasonable rules and regulations," etc.

The court said (p. 549):

> "Police regulations enacted by a city under a general grant of power may differ from those of the State upon the same subject, *provided they are not inconsistent therewith.*" (Italics ours.)

It also said (p. 549-550):

"The power to pass ordinances such as the one here in question was delegated to cities by the State through its legislature. Where the State delegates such power to a municipality it may resume it through legislative action and thus deprive the municipality of the right to exercise it. (*City of Chicago* v. *Phoenix Ins. Co.*, 126 Ill. 276; *Wilkie* v. *City of Chicago*, 188 *id.* 444.) Prior to July 1, 1919, the exclusive power of regulation here involved was lodged in cities and villages by virtue of clause 65 above quoted. By its act to regulate the storage, transportation, sale and use of gasoline and other volatile oils, in force July 1, 1919, the State withdrew from municipalities this exclusive power of regulation and gave to the Department of Trade and Commerce exclusive power to make and adopt reasonable rules and regulations governing the keeping, storage, transportation, sale or use of gasoline and volatile oils, except in cities or villages where regulatory ordinances upon the subject were in full force and effect. * * * The City of Mattoon on July 1, 1919, not having in full force and effect regulatory ordinances on the subject, its delegated power to enact such ordinances was automatically withdrawn by the State and the exclusive power to make such regulations for the city of Mattoon became vested in the Department of Trade and Commerce. The city of Mattoon having been divested of this power by the State, could not by its own action reacquire such power, but could only regain it by subsequent action on the part of the legislature."

A year later, in construing Section 38 of the Illinois Prohibition Act and an ordinance enacted by the City of Litchfield which prohibited the manufacture and sale of intoxicating liquor, the Supreme Court of Illinois in *City of Litchfield* v. *Thorworth*, 337 Ill. 469 (1929) pointed out that the city was bound by the definition of intoxicating liquor contained in the statute and had no authority to prohibit the sale of liquor not prohibited by the statute. At page 475 the court said:

"Section 2 of the Prohibition act defines the phrase

> 'intoxicating liquor.' It is the sale of liquor of the kind specified in the statute that is prohibited. The statute confers authority on municipal corporations to prohibit by ordinance the sale of the kind of liquor prohibited by the statute. The municipality is bound by the definition contained in the statute and cannot prohibit the sale of liquor not prohibited by the statute."

It is clear beyond peradventure from the foregoing cases, that the opinion below is correct on the matter of local law, that the City of Chicago has no inherent power, that its power to regulate milk comes from the State, that the State has the right to take the city's power away before or after the enactment of the city's ordinances, that the ordinance must not be in conflict with the provisions or public policy of the State statutes, and that the city has no right to prohibit what the State statutes or valid rules and regulations adopted pursuant thereto permit.

It will be well to bear in mind those general rules in considering the "saving clause" which the City relies on, namely Section 19 of the Act. Before passing to a discussion of that question, we wish to call the Court's attention again to the limitation on the power of the city imposed by *City of Rockford* v. *Hey*, 366 Ill. 526 (1937). In that case it was held that the City of Rockford had no power (under the same sections of the statute that the City of Chicago is relying on in the present case) to require the owners of ice cream factories in Sterling, Illinois and Dixon, Illinois, to have their factories inspected by Rockford inspectors as a condition precedent to the sale in Rockford of ice cream products manufactured in such factories. The Court said (p. 530):

> "In Illinois, a city organized under the Cities and Villages act has such powers, only, as are therein

expressly delegated by the General Assembly or necessarily implied to render the grant of specific powers effective."

and at p. 531:

"Legislative powers of municipal corporations are strictly construed, and any rational doubt as to the existence of power must be resolved against the municipality."

The Court then stated the issue (pp. 533-534):

"In short, the issue is whether plaintiff, the City of Rockford, may require ice cream factories, located in other cities, to meet sanitary requirements prescribed by the former city in order to entitle them to Rockford licenses upon payment of the annual fee for inspection of their plants.

"Municipalities have no extra-territorial jurisdiction except insofar as it is expressly or impliedly delegated by statute. (55 A. L. R. 1183; *City of Chicago* v. *Brent*, 356 Ill. 40; *Strauss* v. *Town of Pontiac*, 40 *id.* 301.) An inherent or implied limitation upon the city in the exercise of the powers delegated to it by the legislature is that such powers shall be exercised within the corporate boundaries of the municipalities."

"The legislature has not delegated power to municipal corporations to pass a regulatory and license ordinance which assumes to regulate ice cream factories outside their corporate limits. The provisions which plaintiff admits extend to ice cream factories in other cities are so inseparably connected with the other provisions applicable locally as to render the entire enactment void."

It is clear under this case that jurisdiction of the plaintiff's plant at Chemung, McHenry County, Illinois, is exclusively within the jurisdiction of the Department of Health of the State of Illinois and that the State statute relating to pasteurized milk which provides, in part, that all pasteurized milk shall be placed in its final delivery

containers at the plant, that bottling or packaging of milk shall be done at the place of pasteurization by approved mechanical equipment, and that it shall be unlawful for any person to sell or serve any pasteurized milk except in the original container in which it was placed at the point of pasteurization, contemplates the approval by the State Department of Health of plaintiff's operations without requiring approval by the defendant city.

It is important to notice this geographical division of authority between the State of Illinois and the City of Chicago, because the sole reliance of the City of Chicago for its power is on cases like *Koy* v. *City of Chicago*, 263 Ill. 122, and *City of Chicago* v. *Union Ice Cream Mfg. Co.*, 252 Ill. 311, where the pasteurizing or manufacturing plants were located within the confines of the City of Chicago.

The contention of the defendant here, as in the Circuit Court of Appeals, that its right to prohibit single-service containers is preserved by Section 19 of the Milk Plant Pasteurization Act of 1939 (the so-called "saving clause") is untenable. That section provides (Ill. Rev. Stat., 1941, Chapter 56½, Paragraph 133):

> "Nothing in this act shall impair or abridge the power of any city, village or incorporated town to regulate the handling, processing, labeling, sale or distribution of pasteurized milk, and pasteurized milk products, provided such regulation [does] not permit any person to violate any of the provisions of this act."

The word "does" is not a part of the act as passed, but may fairly be implied.

The proviso that "such regulation not permit any person to violate any of the provisions of this act" is simply a codification of the rule of municipal law in Illinois to

the effect that a city ordinance, even though passed under a power granted by the state, is at all times subject and subordinate to the state statutes or other regulations on the same subject promulgated by the state. The proviso does not expressly or impliedly give the City any power to prohibit what the State, by statute and regulations pursuant to statute, has expressly permitted.

The statute cannot be construed to mean (and we do not understand the defendants to so contend) that specific matters shall be subject to determination by both the state and by the city at one and the same time. That would mean chaos, a result not to be imputed to the legislature and a construction to be avoided if at all possible. In *Village of Atwood* v. *Cincinnati, Indianapolis and W. R. Co.*, 316 Ill. 425 (1925), that precise question was before the Supreme Court of Illinois, the issue being whether the Public Utilities Act of Illinois repealed by implication the power long before granted to municipalities to require watchmen at railway crossings. The court recognized the rule (pp. 432-433) that "the police power is an attribute of sovereignty and is primarily vested in the General Assembly, which has the right at any time to recall it from the agency to which delegated, and after being recalled to retain it or to confer it upon some other agency or government" and after finding (p. 430) that the Public Utilities Act gave the commission the power to require railroads to station flagmen at grade crossings, the court held (p. 431):

> "If both the commission and the village authorities can exercise the power, their requirements with reference to the same crossing may be utterly contradictory, for the village board may direct the stationing of a flagman while the commission may order a separation of grades. Obviously, in such cases both cannot be obeyed, and concurrent authority often leads

> to conflict and results in confusion. The Public Utilities act enjoins obedience to the commission's orders. That act is the later one and covers the whole subject of promoting the safety of the public at the intersections of streets and railroads. It is complete in itself and evidently was intended by the General Assembly to supersede the power conferred by subsection 27 of Section 1 of article 5 of the general Cities and Villages act to require railroad companies to keep flagmen at street crossings."

The court held that the Public Utilities Act and the power of the village were so clearly inconsistent that both could not stand and that therefore the power of the village was withdrawn and transferred to the Commerce Commission.

It is true that the question in that case was whether there was a repeal by implication of the powers granted to municipalities but what the court said about the conflict of concurrent jurisdiction and about the desirability of avoiding such conflict is very appropriate to the case at bar. We have conceded that that case did not turn on the construction of a saving clause. We further conceded that except to the extent that the State by and pursuant to the 1939 milk act occupies the field of milk regulation, the powers of the City of Chicago are unimpaired.

In *Northern Trust Co.* v. *Chicago Rys. Co.*, 318 Ill. 402, (1925) already referred to, where the question was whether the City of Chicago retained its power to require street cars to maintain brightly lighted headlights, the court said (p. 410):

> "Did the Public Utilities act of 1913, which conferred this ample control and supervision over public utilities, including street railroads, deprive municipalities organized under the general Cities and Villages act of the power to pass ordinances requiring street railroads to equip their cars with brightly lighted headlights? If both the commission and the city

> could exercise the same power at the same time with reference to the same subject matter their requirements in respect of the same utility might be utterly contradictory. In such cases the utility could not obey both the commission and the city council. Yet the Public Utilities act enjoined obedience to the commission's orders and prescribed severe penalties for failures to comply. Obviously, concurrent authority would lead to conflict and confusion."

There, again, the question was whether the conflict between the Cities and Villages Act and the Public Utilities Act was so complete as to indicate that the latter had repealed the former, but the reasoning of the court supports our contention that where the legislature has withdrawn a portion of the city's power and conferred it on a new agency (in our case, the Director of the Department of Health of the State of Illinois) at least to the extent of any conflict between the state and municipal authorities the state is dominant.

The doctrine of municipal law upon which we rely is well stated by the distinguished corporation counsel of the City of Chicago in Law and the Modern City (Barnett Hodes, 1937, p. 44) as follows:

> "We have seen, up to this point, how two salient principles are invoked to restrict cities—the principle of express authority from the state, and the canon of strict construction against the city. Suppose a city, in its effort to control its own destiny sails by those two shoals. Is it then safe in the sea of state control? Hardly. Ahead is a new reef.
>
> "The new peril is the principle that if the state sees fit to exercise power in its own name over an activity, the city is at once thrust out of the picture. This is the case even where the city has had jurisdiction for generations and its right to exercise the power has been heretofore firmly established. Application of this principle in Illinois has resulted in

> a gradual whittling away of many powers of cities, ranging in importance from control of beauty shops to regulation of transportation lines and other utilities."

With these authorities in mind, it seems clear that the only effect to be given to Section 19 is, first, that it prevents a repeal by implication of all power of municipalities to regulate milk, and, second, that the power of such municipalities continues unimpaired as to the numerous matters not referred to in the statute or in the minimum requirements promulgated pursuant thereto. It, however, gives municipalities no right to enact or enforce ordinances in conflict with the statute or the regulations adopted thereunder. The majority opinion below (Rec. 1792) adopted and succinctly stated this view thus:

> "It therefore appears reasonable that the sole purpose of the saving clause was to prevent a construction by implication withdrawing the vast authority which the city had theretofore had over the milk industry."

The awkward result of a different construction of Section 19 was then pointed out thus (Rec. 1793):

> "The defendants' contention, if sustained, would give the City a broader power than that provided by the Legislature for the state. It would make the state subservient to the city. It would impute to the legislature the purpose of withdrawing the power exercised by the city and by the saving clause reconferring such power. We are unable to believe that such an incongruous result was intended."

The present contention of the defendants that it was never intended by the state legislature that the Milk Pasteurization Plant Act of 1939 should be applicable at all to Chicago was not made in either court below. The de-

fendants' present argument (Petition, p. 27) that the state statute was intended to apply only to those municipalities which were so small that their officers were unable to adopt and enforce adequate regulations of the milk industry is made for the first time in this Court. This intention is said by petitioners to be "clear" (Petition, p. 27). Nothing appears in the Act to support this unusual and unreasonable interpretation. We reply that if the construction of the saving clause contended for by the defendants be adopted, then it follows as a logical inference that the Act is confined in its operation solely to such remote and sparsely inhabited communities. This incongruous construction of the statute would have the effect of rendering that statute inoperative and ineffective throughout the largest and most important part of Illinois. Such a result is certainly to be avoided unless the language of the Act does not permit any alternative. Not one word or syllable appears in the Act which even suggests that the legislature intended the Act to be limited in its territorial application. And if the legislature had so intended it would certainly have expressed that intention in words by a saving clause similar to that in *City of Ottawa* v. *Brown*, 372 Ill. 468 (1939), where such a legislative intention existed and was clearly expressed. This supposed intention of the legislature is merely conjectural and gets not the slightest support from any words in the Act.

The statement by petitioners (Petition, pp. 28-29) that the majority opinion of the Circuit Court of Appeals disregards the plain language of the statute in holding that the City's power is less than it was before the statute was passed, is sustainable only by adopting the view of the defendants (advanced for the first time in this Court) that the July 24, 1939, statute is applicable only to rural

areas and other small communities and not to Chicago, and, as just stated, that contention is not supported by any language in the statute.

Defendants' statement (Petition, p. 31) that the effect of the opinion of the court below is to hold that it is *beyond the power* of a state legislature to prescribe minimum standards throughout the state and at the same time authorize municipalities to fix more stringent standards is a strange perversion of the language of the opinion, which expressly stated "that the city, by virtue of the saving clause, has the power to regulate paper containers * * * but we are unable to accept the theory that it has authority to outlaw that which the state has legalized." Furthermore, the question is not whether it is or is not beyond the *power* of the state to prescribe minimum standards and to authorize municipalities to fix more stringent standards (a power which undoubtedly exists and which we do not question) but *whether the legislature has manifested an intention in the statute under discussion to permit municipalities to fix standards which forbid what the statute permits.* In other words, does the Act manifest an intention by the legislature that it shall become operative in a given municipality, in whole or in part, subject to the approval of, or acceptance by, such municipality, of its provisions? It is only by adopting the view that the Act was intended to have a limited territorial operation that the criticism of this aspect of the opinion becomes understandable. But, as we have above indicated, such an interpretation is impossible.

The further statement of the petitioners (Petition, p. 31) that the Circuit Court of Appeals "disregarded" the language of the saving clause on the ground that if the saving clause was given effect "it would make the

state subservient to the city" finds no support in the language of the opinion. What the court did say was that "*the defendants' contention*, if sustained, would give the city a broader power than that provided by the Legislature for the state. It would make the state subservient to the city." The propriety of this view of the Court is at once apparent when it is realized that *defendants' contention* is that the statute in question was intended by the Legislature to have but a limited territorial application to become effective subject to the approval of the City of Chicago and such other municipalities as might enact ordinances on the same subject. Since there is nothing in the language of the statute to sustain such an interpretation, we submit that the petitioners in stating that the Circuit Court of Appeals "disregarded" the language of the saving clause have taken the same liberty with the language of the opinion as they do with the language of the statute.

The further statement by the petitioners in attempted justification of their criticism of the opinion (Petition, p. 32) that "the state is not subservient to the city if the state permits what the city forbids; each is merely regulating in its own sphere to meet its own particular needs" can be described only as astonishing. The contention is made in even bolder form in the following language (Petition, p. 32) "there is no rule of law that * * * the municipality may not forbid what the state permits." Such statements may be accurate expressions of the rule applicable in states which have adopted "home-rule"; they are in violent conflict with the law in Illinois. The reluctant admission (Petition, p. 32) that there is a rule that where a statute and ordinance conflict, or when an ordinance is contrary to a public policy, the statute

controls, is modified by the statement that such rule applies only when the contrary intention of the Legislature does not appear in the language of the statute. That intention does not appear in the present statute. The *assumption* by the defendants that the statute was intended to have a limited territorial application and that it was to be operative only in those cities and villages which were unable or unwilling to regulate the matters therein specified does not appear in the language of the statute, and there is, therefore, no necessity to discuss the exception to the rule. The rule itself applies: the inconsistent ordinance must yield to the statute.

The Circuit Court opinion gave full effect to the object of Section 19, the "saving clause", in holding that its only effect was to prevent a repeal by implication of the City's entire power to regulate the sale of pasteurized milk. The so-called "saving clause" simply indicated that the statute should supersede the power of the municipality *only to the extent that the state had entered the field of milk regulation.*

As part of the record in the present case there has been printed (R. 23-112) the milk ordinance of the City of Chicago passed January 4, 1935, the rules and regulations of the Chicago Board of Health, and certain resolutions by the Board of Health.* A comparison of the provisions of

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* Exhibit A attached to the complaint indicated by typographical differences what part of the exhibit was the ordinance, what part was rules and regulations and what part constituted the so-called public health reasons. These are all printed in the record in one style of type so that it is difficult to determine where the ordinance leaves off and the rules and regulations of the Board of Health begin. It is also difficult to find where each section of the

the ordinance, and particularly the rules and regulations of the Board of Health, with the 1939 Milk Act passed by the legislature, will indicate to what greater extent than the state statute the Chicago city ordinance goes. It provides for licenses both of sellers and their vehicles (R. 33, R. 34), for the display of the license emblem on each vehicle (R. 36), for the revocation of the license (R. 37), for the labeling and placarding of all bottles, cans, packages, and other containers enclosing milk or any milk product (R. 37), for the inspection of dairy farms (R. 39), for the examination of samples (R. 40), and the permissible "plate counts" for bacteria (R. 44), none of

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ordinance begins and we therefore supply the following table:

| | Chicago Milk Ordinance. | Record Page |
|---|---|---|
| Sec. 3082 | Definitions | 26 |
| Sec. 3083 | Sale of aduiterated milk prohibited | 32 |
| Sec. 3084 | Permit to sell, etc. | 33 |
| Sec. 3085 | License required for sale of milk or milk products | 34 |
| Sec. 3086 | Application—Separate license for each place of business—change of location | 34 |
| Sec. 3087 | License fees | 35 |
| Sec. 3088 | Vehicles to display license emblem on windshield | 36 |
| Sec. 3089 | Revocation of license | 37 |
| Sec. 3090 | Labeling and placarding | 37 |
| Sec. 3091 | Inspection of dairy farms and milk plants, report to be posted | 39 |
| Sec. 3092 | Examination of samples | 40 |
| Sec. 3093 | Kinds of milk—requirements | 45 |
| Sec. 3094 | Dipping—delivery containers—delivery at quarantined places | 108 |
| Sec. 3095 | Products shipped from beyond limits | 110 |
| Sec. 3096 | Notification of disease | 110 |
| Sec. 3097 | Suspicion of infection—procedure | 111 |
| Sec. 3098 | Limit of time of sale | 111 |
| Sec. 3099 | Penalty | 111 |

which subjects is covered by the state statute. It is obvious that the object of Section 19 was to preserve to the City the right to continue the ordinances and regulations on those subjects not occupied by the state system of supervision.

The next, and, we think, determinative question, is whether, in fact, the state of Illinois has occupied the field of approving types of containers so that any action of the City of Chicago in conflict therewith is void.

We submit that the state has, under the terms of the Milk Act of 1939, given its approval to paper containers (termed in the Act single-service containers, but at the present time the only single-service containers in commercial use are paper). As has been seen, Section 4 of the state statute provides for the issuance of a certificate of approval to a pasteurization plant after an inspection "if the plant, equipment and methods of operation" are found to comply with the provisions of the Act. The plaintiff's plant at Chemung, McHenry County, Illinois, is equipped only for the bottling of milk in Pure-Pak paper containers on machines leased from the Ex-Cell-O Corporation, and the plaintiff does not have facilities to bottle milk in glass containers (R. 890).

An integral part of its "method of operation", approved by the State of Illinois (R. 695-696) is the packaging of milk in these containers. That the method of packaging milk is just as much a part of the method of operation which the Director of the Department of Health of the State of Illinois approved, is clearly indicated by the requirements of Section 8 that all pasteurized milk shall be placed in final delivery containers in the plant in which pasteurized and by the provision of Section 15, Item 18, that "bottling or packaging of milk and milk products shall be done at the place of pasteurization by approved me-

**chanical equipment.**" This, of course, means "Approved by the Director of the Department of Health of the State of Illinois."

The Ex-Cell-O Pure-Pak machine, pictures of which are rather poorly reproduced in the printed record (R. 1469, R. 1498-1501), is **equipment** adapted solely to the packaging of milk in Pure-Pak paper bottles by means of a mechanical operation whereby that part of the paper bottle coming in contact with the milk is not touched by human hands at the dairy and before being filled with milk is immersed in a hot paraffin bath, then cooled in the refrigeration unit, and automatically filled, sealed and stapled.

Section 16 (a) of the state statute gives the Department the right to suspend its certificate of approval because of unsanitary conditions of "**milk containers or equipment**". This clearly shows supervision by the State of Illinois of the pasteurization plant, the method of doing business, the equipment, and milk containers, and is an occupation of that field, at least with respect to the approval of the type of container, to the exclusion of the City.

We have shown above repeated references in the statute, and the state rules and regulations promulgated pursuant to it, recognizing paper containers, and in view of the approval by the State of Illinois, pursuant to the state statute, of both the pasteurization plant and the method of operation, namely the use of paper containers instead of glass containers, we insist that the State of Illinois has withdrawn from the City of Chicago the right to prohibit (as distinguished from regulate) paper bottles. On one hand the state approves the pasteurization plant and the type of container and makes it illegal to sell milk in any way except in that container and on the other hand

the City of Chicago steps in and says you may not sell in that type of container. The city is not attempting to *regulate* the container approved by the state, but to *prohibit* it, and the decisive question is whether a creature of the state, such as the City of Chicago, may challenge the approval by the parent state made pursuant to state law, of a method of operation recognized by, although not required by, the statute. We think, under the cases already cited under this heading, the answer is obvious.

Those cases hold clearly that in instances of conflict between state authority and municipal authority, the latter must give way, and we can think of no sharper conflict than the present instance in which the state approves and the city attempts to forbid.

We may ask whether in this particular case an application of this rule will lead to justice or injustice. We submit that it will lead to justice. In this case we have the City of Chicago aligning the *supposed* judgment of fifty aldermen rendered in the year 1935, at a time when these containers were not widely known, against a majority of the Board of Health of the City of Chicago acting in 1939, the General Assembly of the State of Illinois, (which recognized single-service containers as proper in the 1939 Act), the Director of the Department of Health of the State of Illinois, (who has approved the plaintiff's plant and its method of operation), the United States Public Health Service (which has amended its model ordinance expressly to permit single-service containers), and the practical experience of hundreds of other municipalities.

## III.

### The opinion of the Circuit Court of Appeals is in harmony with the decisions of this Court.

Petitioner also contends that the Circuit Court of Appeals' opinion is contrary to decisions of this Court. This is an inaccurate statement for this Court in *Erie Railway Co.* v. *Tompkins*, 304 U. S. 64, and *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, stated that the Circuit Court of Appeals and Districts Courts were in duty bound to follow the law of the state courts and that there was no "general law". In construing the ordinance and statute in question here, the Circuit Court of Appeals, as abundantly shown under Point II above, followed the state law on the subject. Under the rule announced by this Court in the cases mentioned above, it ought not to have done otherwise. The Circuit Court of Appeals *did not* decide any constitutional question and *did not* decide any question of the reasonableness of the milk ordinance, which under Illinois law is a judicial question. Therefore, all of the defendants' argument under Point II of their supporting brief (Petition, pp. 38-58) is disregarded.

## CONCLUSION.

WHEREFORE, respondent prays that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit be denied.

FIELDCREST DAIRIES, INC.,
*Respondent.*

By FRED A. GARIEPY,
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*Its Attorneys.*

Chicago, Illinois,
November 10, 1941.